BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS
MIKE GLEASON – Chairman
WILLIAM A. MUNDELL
JEFF HATCH–MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE FILING BY TUCSON ELECTRIC POWER COMPANY TO AMEND DECISION NO. 62103.	DOCKET NO. E-01933A-05-0650
IN THE MATTER OF THE APPLICATION OF TUCSON ELECTRIC POWER COMPANY FOR THE ESTABLISHMENT OF JUST AND REASONABLE RATES AND CHARGES DESIGNED TO REALIZE A REASONABLE RATE OF RETURN ON THE FAIR VALUE OF ITS OPERATIONS THROUGHOUT THE STATE OF ARIZONA.	DOCKET NO. E-01933A-07-0402

TEP's RESPONSE TO RUCO'S MOTION TO STRIKE TESTIMONY OF THOMAS A. ZLAKET

Tucson Electric Power Company ("TEP"), through undersigned counsel, hereby responds in opposition to RUCO's Motion to Strike the Testimony of Thomas A. Zlaket ("RUCO's Motion to Strike") as follows:

RUCO's Motion to Strike should be rejected because it is (i) untimely; (ii) unsupported by, and contrary to, Arizona law; (iii) unjustly selective as it seeks to exclude only Chief Justice Zlaket's expert testimony while acknowledging that other non-lawyer witnesses have sponsored legal memoranda as part of their testimony which is included in the record of this case; and (iv) inconsistent with the scope of the hearing regarding the Settlement Agreement scheduled to commence on July 9, 2008.

As set forth below, RUCO's Motion to Strike completely ignores Arizona law governing evidence admissible in Commission proceedings. In fact, Arizona law gives the Commission wide

discretion to admit evidence. At best, the RUCO Motion to Strike argues to the weight that the Commission should afford Chief Justice Zlaket's testimony at this point in the proceeding. Its arguments regarding admissibility are groundless.

RUCO's Motion to Strike is an unfortunate, last minute attempt to distract the Parties from the purpose of the Settlement Agreement Hearing, that is, to adjudicate the merits of the proposed Settlement Agreement. RUCO's attempt to strike Chief Justice Zlaket's testimony at this point is an unnecessary step backwards. Chief Justice Zlaket's testimony was filed as rebuttal testimony in the rate case application portion of this case. The signatories to the Settlement Agreement have all agreed that all previously filed testimony in this case would be admitted as evidence (including Chief Justice Zlaket's testimony, the testimony it was rebutting and even RUCO's testimony). The signatories further agreed to preserve their procedural rights in the event the Commission rejects the Settlement Agreement and a hearing on the rate case application is held. If RUCO's Motion to Strike were granted, it would unilaterally nullify that provision negotiated and agreed upon by the signatories of the Settlement Agreement.

There is no factual, equitable or legal basis for granting RUCO's Motion to Strike and it should be rejected by the Commission.

I. RUCO's Motion is Untimely.

TEP filed Chief Justice Zlaket's testimony on April 1, 2008. RUCO's Motion to Strike was filed three months later. RUCO did not offer any explanation as to why it waited until two days before the pre-hearing conference and one week before the commencement of the hearing in this case to file its Motion. TEP believes that RUCO is merely attempting to distract the parties from the real issue at hand—whether the Settlement Agreement is in the public interest. Moreover, RUCO is well aware that the Settlement Agreement provides that all previously filed testimony is to be admitted in the record and that, accordingly, TEP will not be calling Chief Justice Zlaket as a witness at the hearing as it did not submit any additional testimony from Chief Justice Zlaket in support of the Settlement Agreement. Further, TEP would be opposed to any delay in the commencement of the hearing due to RUCO's Motion. **Therefore, TEP has responded within**

twenty-four hours and is prepared to discuss RUCO's Motion to Strike at the July 3, 2008 Procedural Conference and submit the matter for determination by the Administrative Law Judge at that time.

The Commission should not allow the belated Motion to Strike to distract the parties' efforts, delay the hearing or circumvent the terms of the Settlement Agreement.

II. Chief Justice Zlaket's Testimony is Admissible Under Controlling Arizona Law.

RUCO's Motion to Strike is undermined by its failure to cite any case that addresses the admissibility of testimony in a Commission proceeding. Instead, RUCO proffers no more than two isolated quotes from unexplained cases that deal with jury trial and courtroom decorum in other jurisdictions. RUCO fails to cite an Arizona case, statute, or rule. Once actual Arizona law is considered, it is clear that RUCO's motion is ill-founded.

It is well settled that the Commission is not bound by strict rules of evidence. Under ARS § 40-243, "[n]either the commission nor a commissioner shall be bound by technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the commission or a commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission." Likewise, the Commission's procedural rules state that the Commission is not bound by "technical rules of evidence" and that the rules of evidence may be "relaxed" by the Presiding Officer. A.A.C. R14-3-109.K. These provisions recognize that proceedings before the Commission are unlike court proceedings. Indeed, the Commission's broad provisions for admissibility are particularly effective in assisting the Commission in determining whether the broad standard of "in the public interest" is met – something narrow technical evidentiary rules would inhibit.

Moreover, even if this case was subject to the full technical rules of evidence, Chief Justice Zlaket's testimony would still be admissible.[1] Even RUCO acknowledges that there is support for

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[1] If Justice Zlaket's testimony were submitted in court, its admissibility would be governed by Arizona Rule of Evidence 702, which provides that "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an

having expert opinion evidence such as Chief Justice Zlaket's in the record. (RUCO's Motion at page 3, line 7). For example, expert legal testimony on the meaning of statutes has been allowed in an electric rate dispute. *See NUCOR Corp v. Nebraska Public Power Dist,* 891 F.2d 1343, 1350 (8th Cir. 1989).

III. Chief Justice Zlaket's Testimony is Unjustly Selected for Exclusion.

Chief Justice Zlaket's testimony was submitted as rebuttal to the direct testimony of several other parties, including RUCO. RUCO's Motion to Strike has acknowledged (at page 2, lines 10-19) that TEP, RUCO and AECC previously had filed testimony that included information addressing legal issues surrounding TEP's contract claims. In RUCO's February 29, 2008 direct testimony, RUCO adopted that previous testimony [see Direct Testimony of Marylee Diaz Cortez, page 33] and asserted that TEP's position was based on improper assumptions about the 1999 Settlement Agreement. [See Direct Testimony of Ben Johnson, Ph.D, pages 15-16]. Staff witness John Antonuk also provided his interpretation of the 1999 Settlement Agreement in his February 29, 2008 direct testimony at pages 6 and 15 – 20. In response, Chief Judge Zlaket offered his opinion as a former judge as to how, if he was a judge today, he would approach the dispute related to the 1999 Settlement Agreement. Now, in the context of the pending Settlement Agreement, all of the testimony regarding the 1999 Settlement Agreement – both from Chief Justice Zlaket and others – provides background information regarding the underlying dispute over the 1999 Settlement Agreement.

Notably, RUCO does not ask that any other testimony regarding the dispute over the 1999 Settlement Agreement be stricken. RUCO's objection does not seem to be to the subject matter of Chief Justice Zlaket's testimony. RUCO's objection appears to focus on the source of the evidence in attempting to exclude only Chief Justice Zlaket's testimony. It would be unjust and inequitable

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opinion or otherwise." RUCO does not contend that Chief Justice Zlaket is not an expert on Arizona law or Arizona courts. Thus, central issue under Rule 702 is whether the testimony "will assist the trier of fact." Moreover, under Arizona Rule of Evidence 704, testimony in the form of an opinion or inference that is otherwise admissible is not objectionable because it embraces an ultimate issue to be decided.

to strike Chief Justice Zlaket's testimony while all other testimony regarding the dispute over the 1999 Settlement Agreement remains in the record. And, in order to provide the full context of the issues underlying the Settlement Agreement, all of the pre-filed testimony should be admitted – as is common in settlement cases and is provided for in the Settlement Agreement. As is always the case, the Presiding Administrative Law Judge and the Commission will give the testimony whatever weight they deem appropriate.

IV. RUCO's Motion is Inconsistent with the Scope of the Hearing.

RUCO suggests that cross-examining Chief Justice Zlaket will take up Commission time and resources. Although RUCO appears to suggest that Justice Zlaket will be appearing to testify in support of the Settlement Agreement [Motion at page 3, line 18], that is not the case. Chief Justice Zlaket did not provide direct testimony in support of the Settlement Agreement and will not appear at the hearing. In this regard, Chief Justice Zlaket is no different than any other witness who previously filed testimony in the rate case portion of the proceeding, but who did not file testimony in support of (or in opposition to) the Settlement Agreement. Rather, pursuant to the Paragraph 20.1 of the Settlement Agreement, all previously pre-filed testimony, including Chief Justice Zlaket's rebuttal testimony, will be submitted into the record – as has been a standard practice in previous dockets resulting in settlements. For example, RUCO filed testimony on behalf of Ben Johnson. Mr. Johnson's prior testimony would be admitted into evidence whether he filed new testimony or was called as a witness at the hearing. This process provides the context underlying the Settlement Agreement and provides information that assists the Commission in determining whether the Settlement Agreement is in the public interest. Thus, contrary to RUCO's assertion, allowing Chief Justice Zlaket's testimony to be submitted with all the other pre-filed testimony will not require additional time or resources. Rather it is RUCO's untimely Motion that is attempting to delay this process and take-up Commission time and resources.

Further, Paragraph 20.1 expressly reserves the right for parties to challenge testimony such as Chief Justice Zlaket's testimony should the Commission reject the new Settlement Agreement. Any potential concerns other parties may have about any such testimony have been preserved by

the signatories in the event that the Settlement Agreement is not approved by the Commission and the hearing resumes on the original application in this docket.

V. Conclusion

The Commission should deny RUCO's Motion to Strike. It is clear that there is no basis for singling out Chief Justice Zlaket's testimony for exclusion. While RUCO may not be pleased with Chief Justice Zlaket's conclusions, there is no basis to strike his testimony from the record. The Presiding Administrative Law Judge and the Commission can review Chief Justice Zlaket's testimony under the circumstances it has been submitted and give it the consideration and weight that they deem appropriate.

RESPECTFULLY SUBMITTED this 2nd day of July 2008.

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